RECORD AND BRIEFS

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In The
Supreme Court of the United States

LESTER GERARD PACKINGHAM,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of North Carolina

BRIEF OF *AMICI CURIAE* STATE OF LOUISIANA AND TWELVE OTHER STATES IN SUPPORT OF RESPONDENT

JEFF LANDRY
Louisiana Attorney General

ELIZABETH MURRILL
Louisiana Solicitor General

COLIN CLARK
Deputy Solicitor General
Counsel of Record

ANDREA BARIENT
Assistant Attorney General
LOUISIANA ATTORNEY GENERAL'S OFFICE
1885 North Third Street
Baton Rouge, Louisiana 70802
(225) 326-6200
ClarkC@ag.Louisiana.gov
Attorneys for Amicus Curiae State of Louisiana

MARK BRNOVICH
Attorney General
STATE OF ARIZONA
1275 W. Washington St.
Phoenix, Arizona 85007

CYNTHIA H. COFFMAN
Attorney General
STATE OF COLORADO
1300 Broadway, 10th Floor
Denver, Colorado 80203

DOUGLAS S. CHIN
Attorney General
STATE OF HAWAII
425 Queen St.
Honolulu, Hawaii 96813

CURTIS T. HILL, JR.
Attorney General
STATE OF INDIANA
302 W. Washington St.
5th Floor
Indianapolis, Indiana 46204

BILL SCHUETTE
Attorney General
STATE OF MICHIGAN
P.O. Box 30212
Lansing, Michigan 48909

LORI SWANSON
Attorney General
STATE OF MINNESOTA
102 State Capitol
75 Rev. Dr. Martin Luther
King Jr. Blvd.
St. Paul, Minnesota 55155

ADAM PAUL LAXALT
Attorney General
STATE OF NEVADA
100 North Carson St.
Carson City, Nevada 89701

JOSH SHAPIRO
Attorney General
COMMONWEALTH OF
PENNSYLVANIA
Strawberry Square, 16th Floor
Harrisburg, Pennsylvania
17120

KEN PAXTON
Attorney General
STATE OF TEXAS
P.O. Box 12548
Austin, Texas 78711

PETER F. KILMARTIN
Attorney General
STATE OF RHODE ISLAND
150 S. Main St.
Providence, Rhode Island
02903

ALAN WILSON
Attorney General
STATE OF SOUTH CAROLINA
P.O. Box 11549
Columbia, South Carolina
29211

BRAD D. SCHIMEL
Attorney General
STATE OF WISCONSIN
P.O. Box 7857
Madison, Wisconsin 53707

QUESTION PRESENTED

To confront the threat sexual predators pose to children, the North Carolina Legislature enacted a statute that forbids registered sex offenders from accessing "commercial social networking Web sites" that permit minors to become members. N.C. Gen. Stat. § 14-202.5. Petitioner, a registered sex offender, was convicted of violating the statute by creating and accessing a Facebook page. Facebook's terms of use expressly forbid convicted sex offenders from using the site. The question presented is:

Whether the North Carolina Supreme Court correctly held, applying intermediate scrutiny, that the prosecution of petitioner under § 14-202.5 did not violate the First Amendment.

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INTEREST OF *AMICI CURIAE*

The Attorneys General are the chief legal officers of their respective States, and they have a vital interest in reducing the number of sex crimes that occur over the Internet. As this Court knows, "[s]ex offenders are a serious threat in this Nation" and "the victims of sexual assault are most often juveniles." *McKune v. Lile*, 536 U.S. 24, 32 (2002) (plurality). The States have the primary responsibility to meet this daunting problem.

All States have a significant interest in preventing sex offenders from committing additional sex crimes against minors and harvesting information about potential targets on social media. The diligent discharge of the duty to protect the public has been assumed here by North Carolina, which has attempted to devise a solution to a difficult problem. The First Amendment time, place, and manner test leaves States some latitude to decide how best to protect the public from habitual sex offenders.

SUMMARY OF ARGUMENT

North Carolina, as well as every other State in this Union, is seeking a practical solution to a practical problem. The problem is that social media is a dangerous place for children and that registered sex offenders disproportionately commit additional sex crimes online.

North Carolina and a couple of other jurisdictions have proactively sought to prevent online crimes against children from occurring on social media by excluding registered sex offenders from it, even after parole or probation restrictions have ended. North Carolina's concern is not based upon vague generalities. Social networking websites play a role in one-third of Internet-related sex crimes which culminate in an arrest.[1] Of those arrests involving social networking, the vast majority of the offenders used social networking sites to access information about the victim. *Id.* A 2006 study showed that, in the past year, one out of every twenty-five youths had received an unwanted sexual solicitation online by a person who later attempted to contact the youth offline.[2]

This Court has consistently recognized the high recidivism rate of sex offenders. *See, e.g.*, *United States v. Kebodeaux*, 133 S.Ct. 2496, 2503 (2013); *Lile*, 536 U.S. at 33-34 (plurality). Risk of recidivism does not necessarily go away with time. One study showed that, over a twenty-five year period, fifty-two percent of persistent child molesters were rearrested for a new sex offense and thirty-nine percent of rapists were

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[1] Kimberly Mitchell et al., *Use of Social Networking Sites in Online Sex Crimes Against Minors: An Examination of National Incidence and Means of Utilization*, 3 (Manuscript Accepted Jan. 9, 2010), http://www.unh.edu/ccrc/pdf/CV174.pdf, later published in the Journal of Adolescent Health, Vol. 47, Issue 2, at 183-190.

[2] Janis Wolak et al., *Online Victimization of Youth: Five Years Later*, National Center for Missing & Exploited Children, 1 (2006), http://www.missingkids.com/en_US/publications/NC167.pdf.

rearrested for a new sex offense.[3] In general, risk of recidivism also increases with the ease of access to victims. *Id.* at 12. There is nothing to suggest that this risk decreases once parole or probation ends. With seventy-one percent of teenagers active on social networking websites and half of these profiles visible and available to the public, today's sex offenders have access to a far greater number of potential victims than those in the pre-Internet days when offenders were generally limited to in-person contact.[4]

The States may prevent sex crimes against minors from occurring by appropriately regulating the time, place, and manner of speech on the Internet. This Court has long held that such regulations will align with the First Amendment, provided that they "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations and internal quotation marks omitted). The law "need not be the least restrictive or least intrusive means of" combating the problem identified by the North Carolina's General Assembly. *Id.* at 798.

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[3] Tim Bynum et al., Center for Sex Offender Management, *Recidivism of Sex Offenders*, 6-7 (May 2001), http://www.csom.org/pubs/recidsexof.pdf.

[4] Michael Seto, *Internet Sex Offenders*, 109 (American Psychological Association, 2013).

North Carolina General Statute § 14-202.5 meets every prong of the test articulated by this Court in *Ward*. First, the statute is not content-based because it makes no distinction based upon the message the speaker conveys. Second, the law is narrowly tailored because it is not substantially broader than necessary to serve the significant government interest. Third, this Court has found ample alternative channels even when the restriction covers approximately ninety-five percent or more of the available area to communicate. *See Renton v. Playtime Theatres*, 475 U.S. 41, 53-54 (1986). This statute is not nearly as restrictive as the one at issue in *Renton* when one considers that "the content on the Internet is as diverse as human thought." *Reno v. A.C.L.U.*, 521 U.S. 844, 852 (1997) (footnote omitted).

That Packingham would rather use Facebook than another form of communication on the Internet is not determinative. This Court has long recognized that, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 647 (1981) (citations omitted). This Court should apply the standard used in *Ward* and *Heffron* and find that Section 202.5 is a valid time, place, and manner restriction on the Internet use of registered sex offenders.

ARGUMENT

I. Section 202.5 is a reasonable time, place, and manner speech regulation.

A. North Carolina's statute is content-neutral.

The applicable standard of scrutiny hinges on whether the statute is content-neutral. North Carolina's statute is indeed content-neutral.

This Court recently held that content-based laws are those "that target speech based on its communicative content." *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2226 (2015) (citation omitted). A law targets the content of speech if the law applies because a certain topic is discussed or because a particular idea or message is expressed. *Id.* at 2227 (citations omitted). Section 202.5 is not content-based because it makes no distinction based upon the message a speaker conveys. *Id.* In other words, the jury did not need to look at the content of Packingham's message on Facebook to determine whether he violated the statute.

North Carolina's prohibition cannot be condemned on the ground that it applies only to a particular group of speakers because the narrow category of speakers affected by Section 202.5 reflects laudable tailoring rather than any intent to control content.

Not "all speaker-partial laws are presumed invalid." *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 658 (1994). A speaker-partial law is considered content-neutral if the restrictions are based upon "the manner

in which speakers transmit their messages" and are "not a subtle means of exercising a content preference." *Id.* at 645.

North Carolina's law was not adopted because of a disagreement with any particular messages by sex offenders. Rather, North Carolina's interests in preventing crime led it to regulate where the speech at issue may occur. *See Hill v. Colorado*, 530 U.S. 703, 719 (2000). The North Carolina law "places no restrictions on – and clearly does not prohibit – either a particular viewpoint or any subject matter that may be discussed by a speaker. Rather, it simply establishes a reasonable place restriction on an extremely broad category of communications with unwilling listeners." *Id.* at 723.[5] North Carolina's law was adopted to prevent crimes that arise as a result of sex offenders using social media; its restrictions are "justified without reference to the content of the regulated speech." *Boos v. Barry*, 485 U.S. 312, 320 (1988) (plurality) (citation omitted and emphasis deleted).

Because the law at issue only regulates the manner in which sex offenders communicate on the Internet and does not ban any particular subject or

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[5] The listeners in this case are similarly "unwilling," because Facebook has barred registered sex offenders from its site, unequivocally stating that it is an unwilling listener or, at least, an unwilling private forum. Pet. App. 23a; Resp. Br. in Opp. 23.

message, the law is content-neutral. Therefore, strict scrutiny does not apply here.[6]

B. Studies and experience confirm that Section 202.5 serves the substantial governmental interest in protecting children from sexual predators.

This Court has long held that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 757 (1982). Consistent with that objective, the North Carolina General Assembly passed Section 202.5 to "facilitate the legitimate and important aim of the protection of minors from sex offenders who are registered" pursuant to state law. Pet. App. 11a.

North Carolina's law promotes its substantial governmental interest in preventing the sexual abuse of minors and would be achieved less effectively absent the regulation. *See Ward*, 491 U.S. at 799. Like many state legislatures, North Carolina's General Assembly has recognized "that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest." N.C. Gen. Stat. § 14-208.5; Pet. App. 61a; *see also Standley v. Town of Woodfin*, 661

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[6] Several courts reviewing similar laws concluded they are content-neutral. *E.g.*, *People v. Minnis*, 2016 IL 119563, ¶ 32-35 (Ill. 2016); *Doe v. Prosecutor*, 705 F.3d 694, 698 (7th Cir. 2013).

S.E.2d 728, 731 (N.C. 2008) (accepting and applying this finding of fact).

Although this Court undoubtedly exercises independent judgment on issues of constitutional law, "the legislature is in a better position than the judiciary to gather and evaluate data bearing on complex problems." *Minnis*, 2016 IL 119563 at ¶ 41 (citing *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (plurality); *Turner Broadcasting*, 512 U.S. at 665-666 (opinion of Kennedy, J., joined by Rehnquist, C.J., and Blackmun and Souter, JJ.)). That is why, even when assessing whether a statute violates the First Amendment, "courts must accord substantial deference to the predictive judgments of Congress." *Turner Broad. Sys. v. F.C.C.*, 520 U.S. 180, 195 (1997) (citations and internal quotation marks omitted).

The Court should therefore take the same approach as in *Kebodeaux*, where it found that there is "evidence that recidivism rates among sex offenders are higher than the average for other types of criminals," but that there is some conflicting evidence. The Court ruled that Congress has "the power to weigh the evidence and to reach a rational conclusion." 133 S.Ct. at 2503 (citation omitted). The same is true with respect to the North Carolina General Assembly's conclusion.

Not only do sex offenders pose a high risk of recidivism, but they also frequently victimize children on social media. Studies analyzing the recidivism of sex offenders and the victimization of children on the

Internet confirm that Section 202.5 promotes North Carolina's substantial governmental interest in preventing the sexual abuse of minors.

1. Sex offenders are likely to recidivate

Like Alaska in *Smith v. Doe*, North Carolina has concluded that convicted sex offenders pose a substantial risk of recidivism. 538 U.S. 84, 103 (2003); *see also* N.C. Gen. Stat. § 14-208.5; Pet. App. 63a-64a. The Court concluded in *Smith* that the Alaska Legislature's findings are "consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class." *Id.* That risk of recidivism "is 'frightening and high.'" *Lile*, 536 U.S. at 34.

Painstaking undercover operations show that registered sex offenders are much more likely to commit crimes over the Internet compared to adult Americans as a whole. Registered sex offenders account for four to five percent of online solicitors of undercover police officers. Seto, *Internet Sex Offenders*, 183. Because sex offenders comprise only tiny fraction of adult Americans, a registered sex offender is approximately 12.5 to 15.63 times more likely than any other adult American to solicit an undercover officer.[7] In other words, there

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[7] Registered sex offenders represent about one-third of one percent of the adult population in America. *See* Parents for Megan's Law and The Crime Victims Center, *Number of Registrants Reported by State/Territory*, https://www.parentsformeganslaw.org/public/meganReportCard.html (last visited Jan. 18, 2017) (there are approximately 805,781 American registered sex offenders);

is very good reason to believe that registered sex offenders will sexually solicit children online.

North Carolina and this Court had good reasons to conclude that recidivism by sex offenders is high. A five-year follow-up study found that, of persons who had committed child molestation, fifty-three percent of same-sex offenders and forty-three percent of opposite-sex offenders had already been convicted of previous sex offenses. Bynum, *Recidivism of Sex Offenders*, 8-9. That same study showed that same-sex child molesters had a reconviction rate of thirty percent and opposite-sex child molesters had a reconviction rate of twenty-five percent. *Id.* Another study showed that thirty-one percent of extra-familial child molesters were reconvicted of a second sexual offense within six years. *Id.* Further, the risk of recidivism does not go away with time. *Id.* at 6-7. One study showed that, over a

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United States Census Bureau, *Quick Facts*, https://www.census.gov/quickfacts/table/PST045216/00 (last visited Jan. 18, 2017) (there are about 323,127,513 Americans, of which 22.9% are adults and 77.1% are not). By the States' math (323,127,513 X .771 = 249,131,313) and (805,781 / 249,131,313 = 0.0032), about one-third of one percent of adult Americans are registered sex offenders.

That means that a registered sex offender is approximately 12.5 to 15.63 times more likely than any other adult American to solicit an undercover officer. If there was no relationship between persons who are registered sex offenders and online solicitors, then we would assume that registered sex offenders account for only one-third of one percent of online solicitors. However, they account for four to five percent of online solicitors. To determine the amount of the resulting disparity, the numbers used above are reflected by the following equations: .04 / .0032 = 12.5 and .05 / .0032 = 15.625.

twenty-five year period, fifty-two percent of child molesters and thirty-nine percent of rapists were rearrested. *Id.*

2. Children are targeted on social media

The General Assembly accurately identified social media sites as a place where child victimization routinely occurs. The *Journal of Adolescent Health* published a study in 2010 that showed that social networking sites, such as MySpace and Facebook, played a role in thirty-three percent of all types of internet-related sex crimes against minors that culminated in an arrest. Mitchell, *Use of Social Networking Sites in Online Sex Crimes Against Minors: An Examination of National Incidence and Means of Utilization*, 1, 3. Of those arrests involving social networking, eighty-two percent of the time offenders used social networking sites to access information about the victim's likes or interests, sixty-five percent used those sites to learn about the victim's home or school, and twenty-six percent used those sites to learn where the victim was at a specific time. *Id.* at 3.

As one might expect, easy access to minors is one factor which increases the risk of reoffending. *See* Bynum, *Recidivism of Sex Offenders*, 12. One study found that seventy-one percent of teens (ages thirteen to seventeen) have online social networking profiles and half of those are visible and available to the public. Seto, *Internet Sex Offenders*, 109. Additionally, a United Kingdom survey of research revealed that

twenty-five percent of eight- to eleven-year-olds were using social networking websites, even though Facebook's terms of use prohibit access to those twelve and younger. *Id.* at 93. Of the teens, half or more had posted information on their profiles about where they attend school and stated they were not concerned about posting information online. *Id.* at 109. Teens do not only interact with people they know on social media; thirty-one percent respond to stranger contacts. *Id.* Social networking websites allow offenders to solicit a large number of minors in a relatively short amount of time with little risk of detection. *Id.* at 78. This gives sex offenders a greater chance of receiving a response to their online solicitation than exists if they were limited to finding victims in person. *Id.* at 73.

There are many reasons why social networking can be a dangerous place for sex offenders already predisposed to recidivate. Social networking websites allow people to establish relationships that were previously unlikely. The faceless nature of online communication minimizes relationship barriers and also reduces inhibitions.[8] Sex offenders on the Internet are likely to have reduced inhibitions towards previously restrained behavior because of the perception of anonymity. *Id.* The pool of potential victims also grows as

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[8] Robert J. O'Leary & Robert D'Ovidio, *Online Sexual Exploitation of Children*, The International Association of Computer Investigative Specialists, 4 (last visited Jan. 18, 2017), https://www.nga.org/files/live/sites/NGA/files/pdf/0703ONLINECHILD.PDF.

the offender is no longer restricted by physical barriers, such as geographical location. *Id.*

An example helps illustrate some of these particular problems. In June 2016, an Idaho sex offender was arrested for using Facebook to contact teenage girls and requesting to have sex with them.[9] A detective in Spokane, Washington investigated a report that the offender had sent sexually explicit images to a sixteen-year-old victim. The detective found that the offender had sent 18 unsolicited messages, four of which included pictures of his genitalia. The Spokane detective contacted authorities in nearby Coeur d'Alene because there are additional victims living in Idaho. The article ends with a plea for information because detectives believe there may be more victims. *Id.* One offender can quickly victimize many more people over social media than he would in person.

Social media is not only a dangerous place; crime that occurs there is hard to detect because, "[f]or a variety of reasons, sexual assault is a vastly underreported crime." Bynum, *Recidivism of Sex Offenders*, 3, 6. It is estimated that only thirty-two percent of sexual assaults against persons twelve or older are reported to law enforcement. *Id.* Researchers assume that the rate of underreporting for child sexual assault is the same. *Id.* The United States Department of Justice has

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[9] KXLY Spokane Coeur d'Alene, *Sex Offender arrested trying to entice teens on Facebook* (Nov. 20, 2016), http://www.kxly.com/news/local-news/sex-offender-arrested-trying-to-entice-teens-on-facebook/176518420.

stated that "[t]he assumption that sexual crimes against children and teenagers are underreported is now commonly accepted."[10] Internet-based crime is not different. When discussing the limitations of their study, researchers studying sex crimes that occur on social media list underreporting first. Mitchell, *Use of Social Networking Sites in Online Sex Crimes Against Minors: An Examination of National Incidence and Means of Utilization*, at 8.

As a logical consequence of underreporting, most sex crimes (seventy-three percent) that occur on social media that resulted in an arrest involved undercover law enforcement operations. *Id.* at 3. But practical limitations on the amount and effectiveness of undercover operations make them an inadequate substitute for a ban on access to social media.

A recent decision from Louisiana upholding a conviction under a statute similar to Section 202.5 provides a stomach-turning example. After meeting a sex offender on social media, a twelve-year-old child communicated with him, and that communication escalated into both of them exchanging sexually graphic videos. *State v. Murphy*, 2016-0901 (La. App. 1st Cir.

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[10] Robert A. Prentky et al., National Institute of Justice Research Report, *Child Sexual Molestation: Research Issues*, 1 (June 1997), https://www.ncjrs.gov/txtfiles/163390.txt; *see also* Office of Justice Programs, *Chapter 5: Adult Sex Offender Recidivism* (last accessed Jan. 3, 2017), https://www.smart.gov/SOMAPI/sec1/ch5_recidivism.html. ("[R]esearchers widely agree that observed recidivism rates are underestimates of the true reoffense rates of sex offenders.") (Emphasis deleted).

10/28/16), ___ So.3d ___, 2016 La. App. LEXIS 1963, at *3-6. Unfortunately the child did not report the crimes to authorities and investigators were not able to intervene before the offender sexually abused her. *Id.* Like the Idaho sex offender discussed earlier, this case also involved multiple victims over social media. *Id.* at *5.

One 2006 study found that one in seven youths reported experiencing unwanted sexual solicitation within the past year, with thirty-nine percent of those solicitations coming from adults.[11] In an earlier (2000) study, the same researchers found that about one in five youths had received unwanted sexual solicitation online, with twenty-four percent of those solicitations from adults.[12] The studies also showed that minors received "aggressive" online sexual solicitation, in which the solicitor tried to make contact offline, at rates of four percent in the 2006 study and three percent in the 2000 study. Wolak, *Online Victimization of Youth: Five Years Later*, 1. In the more recent study, fifty-six percent of the youths did not tell anyone about the episode.[13]

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[11] *Online Victimization of Youth: Five Years Later*, 1, 17; *see also* Seto, *Internet Sex Offenders*, 74.

[12] Janies Wolak et al., *Online "Predators" and Their Victims*, University of New Hampshire, 1, 3 (June 2000), http://www.unh.edu/ccrc/pdf/Victimization_Online_Survey.pdf.

[13] *Id.* at 20. These two studies also show, again, that much of the data about online youth solicitation in underreported. *See* Seto, *Internet Sex Offenders*, 77; Wolak, *Online "Predators" and Their Victims*, 34.

According to another 2008 study, fourteen percent of tenth to twelfth graders (and nine percent of seventh to ninth graders) have accepted invitations to meet an online stranger in person.[14] Even when there is no offline contact, the costs of online sexual solicitation can still be severe. A "considerable" number of youth (twenty-seven percent) were asked to send sexual pictures of themselves to online sexual solicitors. Wolak, *Online Victimization of Youth: Five Years Later*, 23. This production of child pornography is another cost of the online solicitation of youth.

For all these reasons, the North Carolina General Assembly has a substantial – if not compelling – interest in eliminating social media use by specifically targeting persons who have previously committed a reportable sexual offense.

C. The means chosen by North Carolina are not substantially broader than necessary to achieve the government's interest.

North Carolina's regulation cannot be held invalid "simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward*, 491 U.S. at 800. Rather, the time, place, and manner restriction must be "substantially broader than necessary" to be

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[14] Samuel C. McQuade III and Neel Sampat, Report of the Rochester Institute of Technology, *Survey of Internet and At-risk Behaviors*, 12, 16 (June 2008), http://scholarworks.rit.edu/cgi/viewcontent.cgi?article=2426&context=article.

struck down. North Carolina's law is not substantially broader than necessary and a narrower law would be far less effective. *Id.*

The fact that Lester Packingham's case is nondescript is proof of North Carolina's success. He was convicted of indecent liberties with a minor, a sex crime against a child. Pet. App. 22a. Packingham knew he was not allowed to access Facebook. Pet. App. 22a. He did so anyway and disguised his name. Pet. App. 2a, 22a. Showing that the post for which he was convicted was banal is beside the point. Pet. App. 20a. Packingham has not argued that he was using a false identity to find a job or express himself politically. Rather, the facts suggest poor impulse control, which is more indicative of recidivism rather than expressive activity. *See* Pet. App. 40a. While North Carolina has no gruesome facts to tell about this case, its actions (and the evidence that supports them) suggest that it protected society.

The General Assembly acted sensibly by not limiting its prohibition to registered sex offenders who used the Internet to commit their predicate sex crimes. Evidence shows that sex offenders who were convicted of sexual contact offenses (i.e., physical, hands-on sexual offenses) can also be involved in Internet sex offenses. One in eight online offenders (in this study the online offense was usually the commission of child pornography) have a previous official criminal record for a contact sexual offense at the time of their conviction. Seto, *Internet Sex Offenders*, 180.

A frightening example of a contact offender later using the Internet to recidivate is not hard to find. Late last year, a twice-convicted rapist in South Memphis, Tennessee was arrested for pretending to be a teenage boy on Facebook and using the website to message a young, teenage girl.[15] In 2005 the offender was a manager at a Taco Bell and raped a sixteen-year-old employee. Months later, he sexually assaulted another sixteen-year-old on her first day of work. We can all empathize with the man who lives down the street who explains that "Here in the neighborhood, it's upsetting." *Id.*

North Carolina's law is also not substantially broader than necessary merely because its prohibition applies to both sex offenders that victimized children and sex offenders that victimized adults. As North Carolina explains, research shows that rapists who victimize adults often also sexually victimize children. Resp. Br. 40-41. Although the result is counter-intuitive, "research suggests that many [sex] offenders have histories of assaulting across genders and age groups, rather than against only one specific victim population." Bynum, *Recidivism of Sex Offenders*, 7, n. 2. North Carolina therefore had a sound basis upon which to include offenders who have previously committed a reported sex crime only against an adult.

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[15] Jessica Gertler, WREG Memphis, *Violent sex offender accused of messaging 13yo girl on Facebook* (Nov. 1, 2016), http://wreg.com/2016/11/01/violent-sex-offender-accused-of-messaging-13yo-girl-on-facebook/.

The law is also not unconstitutional on the ground that many Internet sex crimes do not occur on social media. North Carolina cannot be faulted here because it followed the "sound theory that a legislature may deal with one part of a problem without addressing all of it." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975) (citation omitted).

The General Assembly also properly chose not to base its prohibition of sex offenders using social media upon an individualized inquiry. Even many *persistent* sex offenders receive low risk assessment scores on tests designed to gauge recidivism risk. *See* Bynum, *Recidivism of Sex Offenders*, 5. One possible explanation for this phenomenon is that sexual offending differs from other criminal behavior and these screenings are not adequately tailored to the unique factors associated with sexual re-offending. *See id.* Although North Carolina could conceivably limit its statute to persons who, "due to a mental abnormality or a personality disorder, are likely to engage in predatory acts of sexual violence," there is no reason to believe that recidivism is unique to those offenders and, consequently, no basis to believe that the statute would be nearly as effective if it were so limited. *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997) (internal quotation marks and citation omitted).

Content-neutral time, place, and manner speech regulations do not require the least restrictive means available. *Ward*, 491 U.S. at 798. Simply because North Carolina "could have written" a law with "a less severe effect on expressive activity" does not mean that doing

so is constitutionally mandated, nor is it clear that some of Packingham's "suggested exceptions would even be constitutionally permissible." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815-816 (1984); *see* Pet. Br. 53-54. For example, North Carolina might not be able to require website operators to ensure that teenage account holders obtain adult permission prior to establishing accounts because of the preemptive power of the Communications Decency Act. *See* 47 U.S.C. § 230(C)(1); Pet. Br. 51.[16]

Packingham argues that North Carolina cannot serve its stated interest in preventing registered sex offenders from harvesting information about potential victims by prohibiting all social media use because the criminal behavior is only a possible byproduct of social media use. Pet. Br. 44-45. For this argument, he relies principally upon *Frisby v. Schultz* to support his argument. 487 U.S. 474, 485-486 (1988). However, that case is limited to restrictions that ban an entire medium: "A *complete* ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Id.* (emphasis added). This Court requires a greater showing by the government when it bans an entire method of communication. However, that is not what North Carolina has done here. North Carolina did not ban Internet usage or expression.

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[16] Many Courts have held that this law preempts state criminal laws, as well as federal and state civil actions. *See, generally*, Monica DeLateur, *From Craigslist to Backpage.com: Conspiracy as a Strategy to Prosecute Third-Party Websites for Sex Trafficking*, 56 Santa Clara L. Rev. 531, 550-554 (2016).

North Carolina's law is therefore subject to the more forgiving test requiring that the law not be *substantially* broader than necessary. *See Ward*, 491 U.S. at 800. The word substantially implies, of course, that a law can be broader than absolutely necessary.

When determining how much latitude to give States when determining the breadth available to them to solve a problem, the seriousness of the crime at issue should matter in some small degree. The First Amendment is not interpreted solely as a series of logical abstractions, but with the real world in mind. This statute does not involve littering. *Schneider v. State*, 308 U.S. 147, 162 (1939). Nor does it involve burglary. *Martin v. City of Struthers*, 319 U.S. 141, 144 (1943). The devastation caused by online solicitation can lead to child sexual abuse and rape. *See Kennedy v. Louisiana*, 554 U.S. 407, 435 (2008). Comparing North Carolina's interests in this case to the prevention of littering and burglary makes little sense. *See* Pet. Br. 44. As the Illinois Supreme Court recently put it, Packingham fails to recognize the breadth necessary to protect the public. *See Minnis*, 2016 IL 119563, at ¶ 46.

If North Carolina's law (and others like it) are struck down, the effect will be more child sexual abuse. Even the most zealous defenders of the First Amendment recognize that "inclinations of humanity" can

"overcome the somewhat more abstract devotion to the First Amendment."[17]

D. Ample alternative channels are open to Packingham.

Packingham has the burden of proving that ample alternative channels do not exist in order for the statute to be struck under the *Ward* test. *See Ward*, 491 U.S. at 802 (citations omitted). This Court denied the challenge in that case because "there has been no showing that the remaining avenues of communication are inadequate." *Id.*[18] It did not state that the challenge was denied because the government proved that ample alternatives were available.

Packingham has not proven that he cannot cheaply communicate his views to the world on the Internet; nor is there any vast swath of information that will be kept from him. "It is common knowledge that alternative channels for communication over the Internet are abundant." *See Vo v. City of Garden Grove*, 9 Cal. Rptr. 3d 257, 272 (Cal. Ct. App. 2004). The Internet is as varied as human expression itself, even

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[17] Oral Argument, *New York Times Co. v. United States* (Pentagon Papers), 403 U.S. 713 (1971), in 71 *Landmark Briefs and Arguments of the Supreme Court of the United States*, 239-240 (Philip B. Kurland & Gerhand Casper eds. 1975) (response of Counsel for the New York Times, Alexander M. Bickel, to a question from Justice Potter Stewart).

[18] *See, e.g.*, *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 294 (6th Cir. 1998) (reading *Ward* such that the challenger must show the inadequacy of available alternative channels).

without all of the websites listed in the briefing before this Court by all of the parties. *See Reno*, 521 U.S. at 852.

When determining whether ample alternative channels for communication exist, this Court has upheld a restriction that prohibited an adult theater from residing in about ninety-five percent of the available area in Renton, Washington. *See Renton*, 475 U.S. at 53. The adult theater complained that the remaining five percent or so was almost entirely occupied and there were no commercially viable sites. *Id.* This Court rejected the adult theater's arguments and held that the ample alternative channels need only provide "a reasonable opportunity" to participate in the First Amendment activity at issue. *Id.* at 54. The Court specifically rejected the notion that the fact that the adult theater would have to pay more to operate made the alternative channels insufficient. There is no showing that the restrictions on Packingham's legitimate expression and information gathering are nearly as severe.

Nor can this Court strike down North Carolina's statute because Packingham cannot use his preferred method of expression. Although *Renton* was a secondary effects case, rather than one with a time, place, and manner restriction, the ample alternative channels requirement in both tests should be no different. Under *Renton*, the First Amendment requires that North Carolina refrain only from effectively denying petitioner a reasonable opportunity to speak and learn in a similar

manner as he would on social media sites; North Carolina's law easily meets that requirement. *Id.*

Simply because Packingham cannot use a popular forum (one whose terms of service bar him) does not mean that the statute fails to provide ample alternative channels: "An adequate alternative does not have to be the speaker's first or best choice, *see Heffron*, 452 U.S. at 647, or one that provides the same audience or impact for the speech."[19]

Packingham principally relies (at 54-56) on *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994). But that case dealt with a means of communication that was "unique," "important," and "may have no practical substitute." *Id.* at 54, 57. While communication over the entire Internet might fit these criteria, social media does not and Packingham has not shown otherwise. *See* Pet. App. 16a-17a.

This Court has explained that the "wide variety of communication and information retrieval methods" on the Internet "[t]aken together . . . constitute a unique medium." *Reno*, 521 U.S. at 851. The *Reno* decision did not suggest that e-mail or listservs were entire mediums of communication unto themselves. *Id.* There is a good reason for this; the methods of communication over the Internet "are constantly evolving and difficult to categorize precisely." *Id.*

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[19] *Gresham v. Peterson*, 225 F.3d 899, 906-907 (7th Cir. 2000) (citing *Ward*, 491 U.S. at 802; *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 809 (1985)).

There has been extensive disagreement between the parties regarding whether North Carolina's statute covers true social networking websites or whether it covers an array of sites that do not primarily facilitate the social introduction of persons. The two main sites at issue appear to be Amazon.com and NYTimes.com. The better reading of the statute would be to exclude them from the statute's prohibition.

The primary purpose of Amazon.com is to facilitate commercial transactions. *See* N.C. Gen. Stat. 14-202.5(c)(2).[20] It is a member of its own website because the company itself acts as a vendor of goods and also provides a platform for third-party vendors. *See* N.C. Gen. Stat. 14-202.5(c)(2).[21] Therefore, the commercial transactions on Amazon.com involve the sale of goods from members to visitors and, therefore, Packingham may visit the site. *See* N.C. Gen. Stat. 14-202.5(c)(2).

The websites of both the New York Times and Amazon.com are also excluded from the statute's prohibitions because they do not allow users to *link* their profiles/pages to "other personal Web pages on the commercial social networking Web site of friends or

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[20] *See* Greg Bensinger, The Wall Street Journal, *Amazon Posts Another Blockbuster Profit: The latest quarter is Amazon's fifth-straight period in the black*, http://www.wsj.com/articles/amazon-posts-another-blockbuster-profit-1469736704 (July 28, 2016).

[21] *See* CNBC, *Amazon doubles deliveries in 2016 for third-party sellers*, http://www.cnbc.com/2017/01/04/amazon-doubles-deliveries-in-2016-for-third-party-sellers.html (Jan. 4, 2017) ("Chief Executive Jeff Bezos has said that close to 50 percent of the units purchased on Amazon come from third-party vendors.")

associates of the user . . . [such that the link] may be accessed by other users or visitors to the Web site." *See* N.C. Gen. Stat. 14-202.5(b)(3). The first portion of the paragraph requires the following: the commercial social networking website must allow "users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user." *See* N.C. Gen. Stat. 14-202.5(b)(3). The phrase "such as" only refers to the information contained within the user's profile/page. The requirement that the page link with other pages is the best construction of the statute.

Linkedin is not the only major job search website and Twitter is not the only place to read up-to-the-minute news. For example, Indeed.com (another job search site) would not be covered because, among other reasons, the user cannot link a personal profile/page "to other *personal* Web pages . . . that may be accessed by other users or visitors" on Indeed.com. *See* N.C. Gen. Stat. 14-202.5(b)(3) (emphasis added).[22] A job-seeker on Indeed.com does not create an accessible *link* between the seeker's profile/page with another "personal" page. For the same reasons that the New York Times is not covered by the statutes, other major news outlets such as Reuters and USA Today would also not be covered.

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[22] Indeed Blog, *Indeed Hits Record 200 Million Unique Visitors* (Feb. 8, 2016), http://blog.indeed.com/2016/02/08/indeed-200-million-unique-visitors/.

To the extent this Court believes these issues to be close and relevant, it must read the statute in a manner to preserve its constitutionality. The constitutional-doubt canon "militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 247-248 (Thomson/West, 2012) (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

II. States use different methods to address the problem of recidivist sex offenders on social media.

North Carolina's statute is one of many attempting to address the serious threat to minors addressed above. This Court should be cautious to intervene in North Carolina's attempt to stay experimentation of this social legislation. "[O]ne of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Even in the context of criminal constitutional law, this Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, 555 U.S. 160, 171 (2009) (citation omitted).

In light of this principle, there is likely no single correct method to deal with the serious problem of sex offender recidivism over social media. As this Court has held, the validity of a time, place, and manner regulation "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted." *Ward*, 491 U.S. at 800 (citations and internal quotation marks omitted). As shown below, States have restricted convicted sex offenders' ability to use social media in a variety of ways. Rather than putting them up against each other and demanding that only the least-speech-restrictive one survives, the States should be permitted to continue to experiment – at least until a solution is found.

1. Two jurisdictions have enacted laws similar to Section 202.5.

Louisiana bars registered sex offenders who committed a prior sex crime against a child or video voyeurism from creating a profile on a social networking website or attempting to contact other users of the social networking website. La. Rev. Stat. Ann. 14:91.5(A)(1), (B)(3). Louisiana's law limits prohibited websites to those that have the primary purpose of facilitating social interaction, and it contains exceptions for news-disseminating and governmental websites. La. Rev. Stat. Ann. 14:91.5(B)(2)(a), (B)(2)(b)(iii), (B)(2)(b)(iv). Those registered sex offenders who are not covered by La. Rev. Stat. Ann. 14:91.5 may use social media but

must post a notice on their social networking site pursuant to La. Rev. Stat. Ann. 15:542.1(D).

Guam has a similar provision has well. It prohibits all registered sex offenders from accessing social networking websites, instant messaging websites, or chat room if the site permits persons less than eighteen years of age to create a personal web page unless the site restricts the ability of adult members to add minors as connections. 9 GCA § 89.03(i).

2. Most States – including North Carolina, Louisiana, and Guam – require convicted sex offenders to provide their Internet identifiers to law enforcement. For example, Illinois requires sex offenders to publicly disclose and periodically update information regarding their Internet identities and websites, which would include social media profiles. *See Minnis*, 2016 IL 119563, ¶ 1 (citing 730 ILCS 150/3(a); 730 ILCS 152/101 *et seq.*). In *Minnis*, the Illinois Supreme Court rejected the argument that the law violated the First Amendment. *Id.* at ¶ 49.[23] Courts in Pennsylvania, Utah, and Indiana have upheld similar statutes, finding that the First Amendment does not prohibit registrants from being required to give state officials their Internet identifiers. *Coppolino v. Comm'r of the Pa. State Police*, 102 A.3d 1254 Pa. Cmwlth. Ct. 2014), *aff'd*, 125 A.3d

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[23] The *Minnis* Court largely disagreed with cases enjoining similar Georgia, Nebraska, and California requirements. *Id.* at ¶ 46-47 (discussing *Doe v. Nebraska*, 898 F. Supp. 2d 1086 (D. Neb. 2012); *White v. Baker*, 696 F. Supp. 2d 1289 (N.D. Ga. 2010); *Doe v. Harris*, 772 F.3d 563 (9th Cir. 2014)). California's law was recently amended. 2016 Cal. SB 448.

1196 (Pa. 2015); *Doe v. Shurtleff*, 628 F.3d 1217 (10th Cir. 2010), *cert. denied*, 131 S.Ct. 1617 (2011); *Harris v. State*, 985 N.E.2d 767 (Ind. App. 2013).

The majority of States (and some territories) have similar provisions which require submission of Internet identifiers by all registered sex offenders.[24]

Three other states require the submission of Internet identifiers for only a subset of registered sex offenders. Cal. Penal Code § 290.015(a)(4); Cal. Penal

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[24] Ala. Code § 15-20A-7(a)(9); Alaska Stat. § 12.63.010(b)(1)(I); Ariz. Rev. Stat. § 13-3821(I) and (S)(2); Ark. Code Ann. § 12-12-906(g)(3)(Q) and (h)(3)(Q); Del. Code Ann. tit. 11, § 4120(d)(2); Fla. Stat. Ann. § 775.21(2)(j) and (6)(a)(1); 9 GCA § 89.03(b)(4)(H) (Guam); Haw. Rev. Stat. Ann. § 846E-2(d)(5); 730 ILCS 150/3(a); Ind. Code Ann. § 11-8-8-8(a)(7); Iowa Code § 692A.101(15) and (23)(a)(9); Iowa Code § 692A.108(1); Kan. Stat. Ann. § 22-4907(a)(19); La. Rev. Stat. Ann. § 15:542(C)(1)(m); Md. Code Ann., Crim. Proc. § 11-706(a)(7); Mich. Comp. Laws Serv. § 28.727(1)(i) (some social media websites, like Facebook, include an instant messaging function); Miss. Code Ann. § 45-33-25(2)(w); Mo. Rev. Stat. § 589.407(1)(1); Mo. Rev. Stat. § 43.650(4)(10); Mo. Rev. Stat. § 43.651(1)(4); Mont. Code Ann. § 46-23-504(3)(h); N.C. Gen. Stat. § 14-208.7(b)(7); N.H. Rev. Stat. Ann. § 651-B:4-a; N.M. Stat. Ann. § 29-11A-4(B)(8); N.M. Stat. Ann. § 29-11A-3(J); N.Y. Correct. Law § 168-b(1)(a); N.Y. Correct. Law § 168-a(18); Ohio Rev. Code Ann. § 2950.04(C)(10); Okla. Stat. tit. 57, § 584(A)(9); 42 Pa. Cons. Stat. Ann. § 9799.16(b)(1) and (b)(2); 4 L.P.R.A. § 536c; S.C. Code Ann. § 23-3-555(A)(3) and (B)(1); S.D. Codified Laws § 22-24B-8(13); Tenn. Code Ann. § 40-39-203(i)(17); Tex. Code Crim. Proc. Art. 62.051(c)(7); Tex. Code Crim. Proc. Art. 62.001(12); Utah Code Ann. § 77-41-105(8)(i) and (8)(j); Utah Code Ann. § 77-41-102(12); Va. Code Ann. § 9.1-903(B); 14 V.I.C. § 1726(b)(7); W. Va. Code § 15-12-2(d)(8); Wis. Stat. § 301.45(2)(a)(6m); Wyo. Stat. Ann. § 7-19-302(a)(xii).

Code § 290.024(a); Colo. Rev. Stat. § 16-22-108(2.5)(a); Conn. Gen. Stat. § 54-251(a).

3. Finally, many States impose by statute limits on Internet use as a condition of sex offenders' probation or parole. For example, New Jersey subjects certain registered sex offenders to lifetime supervision "as if on parole" and, as a condition of release, registrants *must* agree to refrain from Internet use unless the registrant has prior approval from the court or, if the Internet use is related to an employment search, obtained prior approval from the offender's parole officer. *See J.I. v. N.J. State Parole Bd.*, 120 A.3d 256, 259 (Super. Ct. App. Div. 2015), *cert. granted*, 127 A.3d 701 (N.J. 2015); N.J.S.A. 30:4-123.59(b)(2)(a); N.J.S.A. 2C:43-6.4(f)(1).[25] There are other mandatory and discretionary prohibitions upon Internet use. *See* N.J.S.A. 30:4-123.59(b)(2). Most pertinent here, the New Jersey State Parole Board adopted a general condition, N.J.A.C. 10A:71-6.11(b)(23), which prohibits all lifetime registrants "from using any computer and/or device to create any social networking profile or to access any social networking service or chat room in the offender's name or any other name for any reason unless expressly authorized. . . ." *See also J.I.*, 120 A.3d at 262. The intermediate court of appeals upheld the social networking condition as facially constitutional and

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[25] The New Jersey Supreme Court has agreed to consider this case, but an opinion has yet to be issued. New Jersey Courts, *Track Supreme Court Appeals*, https://www.judiciary.state.nj.us/calendars/sc_appeal.html (last updated Jan. 9, 2017) (noting that the case was argued on Nov. 7, 2016 but has not been decided).

constitutional as applied under the First Amendment. *Id.* at 263-265.

Nevada prohibits registered sex offenders on probation or parole from accessing the Internet unless possession of an Internet-capable device is approved by the offender's probation or parole officer. Nev. Rev. Stat. Ann. § 176A.410(1)(q); Nev. Rev. Stat. Ann. § 213.1245(1)(p).

New York mandatorily prohibits access to a commercial social networking website when a sex offender has been sentenced to probation or conditional discharge and either the victim of the sex offense was under the age of eighteen at the time of the offense or, in some cases, where the Internet was used to facilitate the commission of the crime. *See* N.Y. Penal Law sec. 65.10(4-b). The law also prohibits communications made

> for the purpose of promoting sexual relations with persons under the age of eighteen, and communicat[ions] with a person under the age of eighteen when such offender is over the age of eighteen, provided that the court may permit an offender to use the internet to communicate with a person under the age of eighteen when such offender is the parent of a minor child and is not otherwise prohibited from communicating with such child.

N.Y. Penal Law § 65.10(4-b). Minnesota and Texas have probation or parole restrictions that are similar to New York's prohibition. Minn. Stat. § 244.05(6)(c); Tex. Gov't Code Ann. § 508.1861(b).

Like New York and Texas, Indiana specifically prohibits contact between certain sex offenders and minors. If a sex offender in Indiana violates a condition of probation, parole, or rule of a community transition program that prohibits communication with a child less than sixteen years old using a social networking site, instant messaging site, or chat room program, the offender commits a misdemeanor. Ind. Code Ann. § 35-42-4-12(b).

Some States also require the offender on probation or parole to consent to law-enforcement searches of all Internet-capable devices, as well as monitoring of those devices, while on probation or parole. *E.g.*, Ind. Code Ann. § 11-8-8-8(b); N.J.S.A. 2C:43-6.4(f)(2) and (f)(3).

Petitioner's approach calls into question many of these laws. A plurality of this Court had a better approach: the government "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976) (plurality).

CONCLUSION

The judgment of the Supreme Court of North Carolina should be affirmed.

Respectfully submitted,

JEFF LANDRY
Louisiana Attorney General

ELIZABETH MURRILL
Louisiana Solicitor General

COLIN CLARK
Deputy Solicitor General
Counsel of Record

ANDREA BARIENT
Assistant Attorney General
LOUISIANA ATTORNEY
GENERAL'S OFFICE
1885 North Third Street
Baton Rouge, Louisiana 70802
(225) 326-6200
ClarkC@ag.Louisiana.gov

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